No. 06-1111

In The Supreme Court of the United States

PETER BROOKS, DAVID T. GIES, PATRICIA CLEMMER PETERS, ROBIN B. HEATWOLE, DRY COMAL CREEK VINEYARDS, a Texas Corporation, HOOD RIVER VINEYARDS, an Oregon Sole Proprietorship, and SCHNEIDER LIQUOR COMPANY, INC.,

Petitioners,

v.

ESTHER H. VASSAR, PAMELA O'BERRY EVANS, and SUSAN R. SWECKER, all in their official capacities as members of the Virginia Alcoholic Beverage Control Board, and VIRGINIA WINE WHOLESALERS ASSOCIATION, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF ESTHER H. VASSAR, PAMELA O'BERRY EVANS, AND SUSAN R. SWECKER IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Twenty-first Amendment enhances the States' sovereignty by allowing them to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Petition concerns the scope of that sovereign power. The questions presented are:

1. May a State require that all or virtually all alcohol consumed in the State pass through the State's regulatory system?

2. When a State sells wine in direct competition with more than 10,000 private retailers, may the State sell only wine that was produced within the State?

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of Esther H. Vassar, Pamela O'Berry Evans, and Susan R. Swecker, all in their official capacities as members of the Virginia Alcoholic Beverage Control Board (collectively "Virginia"), responds to the Petition for a Writ of Certiorari.[1] For the reasons detailed below, the Petition should be denied.

INTRODUCTION

The Twenty-first Amendment, U.S. Const. amend. XXI, § 2, allows "States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use." *Granholm v. Heald*, 544 U.S. 460, 484 (2005). Exercising the sovereign power conferred by the Twenty-first Amendment, the States have prohibited or severely restricted the importation of alcohol for personal use.[2] These import restrictions ensure that all

[1] On February 15, 2007, this Court extended the time for filing the response to April 9, 2007.

[2] Thirty-six States and the District of Columbia regulate the flow of alcoholic beverages brought into their borders in some fashion. The quantity of alcoholic beverages transported by an interstate traveler into a State or the District of Columbia is regulated through possession, transportation, or excise taxation statutes. *See Connecticut Gen. Stat.* § 12-436; *Delaware Code* tit. 4, § 716; *Florida Stat.* ch. 562.15; *Georgia Code* § 3-3-8; *Hawaii Rev. Stat.* § 281-33.1; *Idaho Code* § 23-610; *Illinois Comp. Stat.* § 235 ILCS 5/1-3.16; *Indiana Code* § 7.1-5-11; *Iowa Code* § 123.22; *Kansas Stat.* § 41-501; *Maine Rev. Stat.* tit. 28-a, § 2076; *Maryland Code* Tax-General, § 5-104; *Massachusetts Gen. Laws* ch. 138, § 22; *Michigan Comp. Laws* § 436.1203(8)(a); *Minnesota Stat.* § 297g.07; *Missouri Rev. Stat.* § 311.420; *Montana Code* § 16-6-301; *Nebraska Rev.*

(Continued on following page)

or virtually all alcohol consumed in a State passes through the State's regulatory system. Requiring all or virtually all alcohol to pass through the State's regulatory system is "unquestionably legitimate." *Id.* at 489. Indeed, "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Id.*

Nevertheless, the Petitioners contend that restrictions on the importation of alcohol for personal use are unconstitutional. Recognizing that any import restriction inhibits the ability of individuals to go to another State, purchase alcohol, and then return to their home State, the Petitioners claim that import restrictions violate the

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Stat. § 53-194.03; *Nevada Rev. Stat.* § 369.490; *New Hampshire Rev. Stat.* § 175:6; *New Jersey Stat.* § 33:1-2; *New Mexico Stat.* § 60-7A-3; *North Carolina Gen. Stat.* § 18B-402; *North Dakota Cent. Code* § 5-01-16; *Ohio Rev. Code* § 4301.20; *Oklahoma Stat.* tit. 37, § 537; *Oregon Rev. Stat.* § 471.405; 47 *Pennsylvania Cons. Stat.* § 491(2); *South Dakota Codified Laws* § 35-4-66; *Tennessee Code* §§ 57-3-401, 402; *Texas Alco. Bev. Code* § 107.07; *Vermont Stat.* tit. 7, § 61; *Virginia Code* §§ 4.1-310, 311; *Washington Rev. Code* § 66.12.120; *West Virginia Code* § 60-6-6; *Wyoming Stat.* § 12-3-101. *See also D.C. Code* § 25-772. Another State – Alaska – has an Attorney General's Opinion imposing similar regulations. *Alaska Att'y Gen. Op.* (June 25, 1953). Of the remaining thirteen States, all either completely prohibit the interstate importation of alcoholic beverages on the person, or impose stringent regulations, such as requiring the resident to obtain prior regulatory permission to bring the beverages into the State, and/or requiring the payment of in-state excise taxes on alcoholic beverages purchased out-of-state upon their introduction into the State. *See Alabama Code* § 28-3A-25; *Arizona Rev. Stat.* § 4-244.02; *Arkansas Code* 3-3-216; *California Bus. & Prof. Code* § 23661; *Colorado Rev. Stat.* §§ 12-47-106(4), 12-47-901(1)(j), (3)(a); *Kentucky Rev. Stat.* §§ 243.200, 243.720; *Louisiana Rev. Stat.* §§ RS 23:360, 361; *Mississippi Code* § 97-31-47; *New York Alco. Bev. Cont. Law* § 102; *Rhode Island Gen. Laws* § 3-6-14; *South Carolina Code* § 12-21-1610; *Utah Code* §§ 32A-12-201, 212; *Wisconsin Stat.* § 139.03(5)(a).

negative aspect of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. Additionally, although the negative aspect of the Commerce Clause is inapplicable when the State acts as a market participant, *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808-10 (1976), the Petitioners further contend that Virginia may not favor wine produced within its borders when it sells wine in direct competition with more than 10,000 private retailers and many out-of-state wineries that are licensed by Virginia to ship directly to Virginia consumers.

Neither contention is worthy of this Court's review. The decision below is correct, there is no conflict among the Circuits, and the lack of a developed record makes the Petition a poor vehicle to resolve the questions presented. Certiorari should be denied.

STATEMENT

1. This matter involves a constitutional challenge to two aspects of Virginia's regulation of alcoholic beverages. First, *Virginia Code* § 4.1-310(E) ("Personal Import Exception") prohibits consumers from personally transporting more than one gallon (four liters if the alcoholic beverages are being transported in metric-sized containers) of any alcoholic beverages from another State into Virginia.[3] This limit applies to all alcohol obtained out-of-state, regardless of whether the alcohol was

[3] If a person is relocating his place of residence to Virginia, this provision also prohibits him from shipping more than a "reasonable quantity" of alcoholic beverages, not for resale, in his personal or household effects.

produced in Virginia or some other State or abroad. By limiting the ability of individuals to import alcohol into the State, Virginia prevents the circumvention of those statutes requiring that virtually all alcohol consumed in the State pass through Virginia's regulatory system.

Second, Virginia, in the exercise of its sovereign authority under the Twenty-first Amendment, has decided that, with limited exceptions, distilled "hard" liquor will only be sold in retail stores that are owned and operated by Virginia. *See Virginia Code* §§ 4.1-119 and 4.1-221. These stores, known as "ABC stores," sell not only approximately 2000 "hard liquor" items, but also wine produced by "farm wineries" located in Virginia. *See Virginia Code* § 4.1-119(A) ("State Stores Provision"). While the ABC stores have a monopoly on the sale of "hard liquor," they compete with more than 10,000 private retailers for the sale of wine and with a number of wineries, both inside and outside of Virginia, that are licensed by Virginia to ship directly to Virginia consumers. *See Virginia Code* §§ 4.1-112.1 and 4.1-119.

2. This litigation began in 1999 when Petitioners Robin B. Heatwole, Dry Comal Creek Vineyards, Hood River Vineyards, and others who have since withdrawn from the litigation challenged "the constitutionality of Virginia's Alcoholic Beverage Control laws, which prohibit the importation of wine and beer into Virginia except through a regulated, multi-tiered structure." *Bolick v. Danielson*, 330 F.3d 274, 276 (4th Cir. 2003) (*Bolick II*). Several statutes were alleged to be unconstitutional "principally because they favor local wine and beer manufacturers, who are permitted to sell directly to consumers, and discriminate against out-of-state wine and beer manufacturers, who must sell through the more costly

multi-tiered structure." *Id.* Although the complaint challenged the State Stores Provision, it did not challenge the Personal Import Exception. Ultimately, the district court agreed that Virginia could not permit in-state wineries to ship directly while prohibiting out-of-state wineries from doing so and that the State Stores Provision was unconstitutional. *See Bolick v. Roberts,* 199 F. Supp. 2d 397, 417 (E.D. Va. 2002) (*Bolick I*).

3. Virginia then appealed to the Fourth Circuit. While the case was pending, the Virginia General Assembly enacted new legislation that allowed out-of-state wineries licensed by Virginia to ship directly to Virginia consumers and, thus, mooted portions of the case. *Bolick II,* 330 F.3d at 276. The new legislation also altered the analysis and arguments for the State Stores Provision of the case. *Id.* at 276-77. Accordingly, the Fourth Circuit vacated the entire judgment and remanded for "reconsideration of plaintiffs' challenges in light of the recent statutory enactments and in light of *Beskind* [*v. Easley*, 325 F.3d 506 (2003)]." *Id.* at 277.

4. On remand to the district court, the lawsuit was transformed. Two litigants, including the lead plaintiff, dropped out of the litigation. Petitioners Peter Brooks, David T. Gies, Patricia Clemmer Peters, and Schneider Liquor Company decided to join the litigation. This new configuration of Petitioners filed an amended complaint setting forth *new* challenges to *different* provisions of Virginia's alcoholic beverage control laws. In addition to challenging the Personal Import Exception and renewing the challenge to the State Stores Provision, the Petitioners challenged:

- *Virginia Code* § 4.1-112.1(B) which, at the time, required that applicants for a shipping license who were not brand owners to obtain explicit written permission from brand owners in order to ship wine and beer to Virginia consumers. If an applicant for a Virginia shipping license already held a Virginia retail off premises license and purchased alcohol from a Virginia licensed wholesaler, there was a rebuttable presumption that the brand owner had granted permission to ship.

- *Virginia Code* §§ 4.1-207(5) and 4.1-208(1) which, at the time, allowed Virginia farm wineries and breweries to by-pass the wholesalers and deliver their products directly to retailers while out-of-state wineries and breweries were required to use wholesalers. *Virginia Code* § 4.1-310.

- *Virginia Code* §§ 4.1-207(4) and 4.1-208(7) which, at the time, permitted Virginia-based wineries and breweries to sell unlimited quantities of their respective products on site and to deliver unlimited amounts to consumers as long as they performed their own deliveries.

After the Magistrate Judge recommended that all of these statutes be declared unconstitutional, the district court accepted that recommendation in all relevant respects. *Pet. App.* at 40a-41a; 63a.

5. Virginia immediately appealed and the Petitioners cross-appealed on the issue of remedy. While the appeal was pending, the Virginia General Assembly amended *Virginia Code* §§ 4.1-112.1(B), 4.1-207(4), 4.1-207(5), 4.1-208(1), and 4.1-208(7) so as to eliminate the constitutional problems

identified by the district court. Because the statutes had been amended, the Fourth Circuit vacated that portion of the district court judgment that held those statutes to be unconstitutional. *Pet. App.* at 5a; 10a-12a. Thus, the only remaining issues were the constitutionality of the Personal Import Exception and the State Stores Provision.

a. The court of appeals found the Personal Import Exception "is justified as an appropriate regulation under the Twenty-first Amendment that is not denied legitimacy by being 'economic protectionism,' as was condemned by the holdings of *Granholm* and *Bacchus*." *Pet. App.* at 21a. As the Court explained:

> the Commonwealth's interest in otherwise regulating the importation, transportation, and use of wine in Virginia is protected by the Twenty-first Amendment. It is readily apparent that the Personal Import Exception is not economic protectionism but part of Virginia's import regulation. It provides a *de minimis* exception to Virginia's import regulations, allowing consumers to import one gallon or four liters of wine for personal consumption. Under no economic construct could such a provision be considered economic protectionism of local industry. To the contrary, it actually amounts to disadvantage local wineries whose wine may only be purchased through retailers.

Pet. App. at 22a-23a.

Judge Niemeyer also believed that the Personal Import Exception did not violate the negative aspect of the Commerce Clause. As he observed:

> an argument that compares the status of an in-state retailer with an out-of-state retailer – or that compares the status of any other in-state

> entity under the three-tier system with its out-of-state counterpart – is nothing different than an argument challenging the three-tier system itself. As already noted, this argument is foreclosed by the Twenty-first Amendment and the Supreme Court's decision in *Granholm,* which upheld the three-tier system as "unquestionably legitimate." As the ABC Act now stands, *all* out-of-state suppliers of wine are required by Virginia to sell in Virginia through the three-tier system . . . and the Personal Import Exception to that import restriction does not favor in-state wineries.

Pet. App. at 18a-19a (Niemeyer, J., announcing the judgment of the Court) (parenthetical omitted).

b. The lower court also found the State Stores Provision to be valid. *Pet. App.* at 23a-32a. As the Court explained:

> Virginia has elected to sell beer and wine, as well as some related products – along with liquor- from state-owned and operated stores. And just as the Commonwealth has elected not to sell every brand of liquor manufactured, it has elected not to sell out-of-state wines, choosing instead to sell only Virginia-produced wines. In doing so, it competes as a participant in the Virginia wine market with the thousands – more than 10,000, according to Virginia – of other private wine retailers who sell both Virginia wines and out-of-state wines in Virginia. Virginia's choice of selling only Virginia wine is no more inappropriate than would be its choice to sell only Hershey's brand chocolate bars at a State commissary. Like all other in-state wine retailers, the ABC stores can choose which wines they purchase and stock, and Virginia's commitment to purchase only in-state wines is a

> choice that any wine retailer would be free to make for itself. This choice is indistinguishable from Maryland's choice in *Alexandria Scrap*. Just as Maryland favored in-state sellers when it purchased automobile scrap at high prices, Virginia favors in-state wines in its stores.

Pet. App. at 26a-27a.

c. District Judge Goodwin, sitting on the Fourth Circuit by designation, dissented from both the Personal Import Exception and State Stores Provision holdings. As to the Personal Import Exception, he explained:

> The majority concludes that to find the Personal Import Exception unconstitutional, we also would have to find Virginia's three-tier distribution system unconstitutional. I disagree. The discriminatory effect of the Personal Import Exception occurs *after* the beverages have passed through Virginia's three-tier system. It is at this stage, when the alcoholic beverages are on the shelves ready for market, that interstate commerce is impermissibly impeded.

Pet. App. at 35a. (Goodwin, J., dissenting) (emphasis original). With respect to the State Stores Provision, he believed that the negative aspect of the Commerce Clause was applicable because "[a] consumer's demand for purchasing both a bottle of liquor *and* a bottle of wine *at the same time* may be satisfied *only* in ABC Stores. The relevant market is not the market for wine, but the market for *wine and liquor*." *Pet. App.* at 38a. (Goodwin, J., dissenting) (emphasis original).

The Petition for Certiorari followed.

REASONS FOR DENYING THE PETITION

The Petition should be denied for three reasons. First, the lower court's decision is correct. "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. Virginia's regulatory system in general and the Personal Import Exception in particular treat alcohol produced in other States in the same manner as alcohol produced in Virginia. Moreover, even if the Twenty-first Amendment did not authorize Virginia to adopt these statutes, Congress has passed legislation explicitly authorizing the States to regulate alcohol.

Additionally, when a State acts as a market participant, its choices about what to buy and sell are insulated from Commerce Clause scrutiny. Thus, when Virginia sells wine, it may favor in-state products. The fact that Virginia regulates the alcohol market does not change this constitutional reality, particularly when Virginia is competing with more than 10,000 private sector wine retailers as well as numerous wineries that are licensed by Virginia to ship directly to consumers.

Second, there is no conflict among the Circuits concerning the validity of requiring all or virtually all alcohol to pass through the State's regulatory system. Nor is there a conflict among the Circuits as to whether a State may favor in-state products when competing directly with the private sector in the wine market. In the absence of a conflict among the Circuits and in a situation where the lower court has *upheld* the state statute, this Court should decline to grant review.

Finally, the Petition is a poor vehicle for resolving the questions presented. There is no record concerning the economic impact of the Personal Import Exception. While there is a record concerning the impact of the State Stores Provision, that record is incomplete since it does not include evidence regarding the impact of Virginia's direct shipment statutes, which were enacted in 2003. If this Court is going to address these questions, it should do so in a case with a fully developed record.

I. THE LOWER COURT'S DECISION IS CORRECT.

A. The State Can Require Virtually All Alcohol Consumed in the State to Pass Through the State's Regulatory System.

1. The Twenty-first Amendment Empowers the States to Require Virtually All Alcohol Consumed in the State to Pass Through the State's Regulatory System.

The Twenty-first Amendment creates "an exception to the normal operation of the Commerce Clause," *Craig v. Boren*, 429 U.S. 190, 206 (1976), and, by a fundamental reallocation of sovereignty, "empowers [each State] to control alcohol in ways that it cannot control cheese."[4]

[4] Although the Constitution "divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day," *New York v. United States*, 505 U.S. 144, 187 (1992), the People, by adopting constitutional amendments, have reallocated power between the two sovereigns. For example, by "adopting the Fourteenth Amendment, the People required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution" and transferred that sovereignty to the National Government. *Alden v. Maine*, 527 U.S. 706, 756 (1999). On

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Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000). *See also Granholm*, 544 U.S. at 494 (Stevens, J., joined by O'Connor, J., dissenting) ("[E]ver since the adoption of the Eighteenth Amendment and the Twenty-first Amendment, our Constitution has placed commerce in alcoholic beverages in a special category.") Indeed, the "Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Consequently, Virginia "has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system . . . [including] the power to control shipments of liquor during their passage through their territory and to take appropriate steps to prevent the unlawful diversion of liquor into their regulated intrastate markets." *North Dakota v. United States,* 495 U.S. 423, 431 (1990) (Stevens, J., joined by Rehnquist, C.J., White & O'Connor, JJ., announcing the judgment of the Court) (citation omitted). Indeed, ever since the Twenty-first Amendment was first adopted, it has always been "transparently clear," *Craig*, 429 U.S. at 207, that States could control who may import, transport, distribute, and sell, as well as purchase, alcoholic beverages within a State. *See North Dakota*, 495 U.S. at

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the other hand, by adopting the Twenty-first Amendment, the People returned to the States a portion of the power originally surrendered to the National Government under the Commerce Clause. Specifically, the People created an exception to the Commerce Clause so that "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

447 (Scalia, J., concurring) ("Twenty-first Amendment . . . empowers [the States] to require that all liquor sold for use in the State be purchased from a licensed in-state [entity]."). After the adoption of the Amendment, the States have the "plenary power to regulate and control . . . the distribution, use, or consumption of intoxicants within her territory." *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964). *See also North Dakota*, 495 U.S. at 424 (Stevens, J., joined by Rehnquist, C.J., White & O'Connor, JJ., announcing the judgment of the Court) (Twenty-first Amendment gives States "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system.").

To be sure, the discretion given to the States by the Twenty-first Amendment is not absolute. In regulating alcohol, the States may not violate the First Amendment, *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 514-16 (1996); the Establishment Clause, *Larkin v. Grendel's Den, Inc.,* 459 U.S. 116, 122 (1982); the Equal Protection Clause, *Craig,* 429 U.S. at 204-09, the Due Process Clause, *Wisconsin v. Constantineau,* 400 U.S. 433, 509 (1971), or the Import-Export Clause. *James B. Beam Distilling Co.,* 377 U.S. at 344-46. Nor does the Twenty-first Amendment allow the States to interfere with the National Government's ability to regulate interstate commerce. *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 712-16 (1984); *Midcal,* 445 U.S. at 106-10. Indeed, the States' power under the Twenty-first Amendment is limited by the nondiscrimination principle of the Commerce Clause. *Granholm,* 544 U.S. at 486-89; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) ("The central purpose of the [Amendment] was not to empower States to favor local

liquor industries by erecting barriers to competition."); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) ("When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry."); *Healy v. Beer Inst.*, 491 U.S. 324, 328 (1989) (invalidating a state statute that required producers to limit the price of alcohol). Rather, as this Court explained:

> The Twenty-first Amendment *grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.* A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. *States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system.* We have previously recognized that the three-tier system itself is "unquestionably legitimate." *State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent.*

Granholm, 544 U.S. at 488-89 (emphasis added, citations omitted). In other words, as long as the State does not discriminate based on where the alcohol was produced, the State may require all alcohol consumed in the State to pass through the State's regulatory system.

Virginia's regulatory system is consistent with these principles. If alcohol is imported from another State, it must be imported by a Virginia-licensed wholesaler,

Virginia Code § 4.1-310, or through a Virginia-licensed direct shipper, *Virginia Code* § 4.1-112.1. If the alcohol is produced in Virginia, it must be distributed by a Virginia-licensed wholesaler, *Virginia Code* § 4.1-310, or through a Virginia-licensed direct shipper, *Virginia Code* § 4.1-112.1. In order to sell alcohol, Virginia's retailers, bars, and restaurants must be licensed. *Virginia Code* § 4.1-302. If licensed to sell alcohol, the retailers, bars, and restaurants must purchase the alcohol from a Virginia-licensed wholesaler. *Virginia Code* § 4.1-326. If a consumer wishes to purchase alcohol, he must do so from one of Virginia's ABC Stores or from a Virginia-licensed direct shipper, retailer, restaurant, or bar. *Virginia Code* § 4.1-303. Thus, regardless of where it is produced, virtually all alcohol consumed in Virginia must pass through Virginia's regulatory system.

There is an exception to this requirement that alcohol pass through Virginia's regulatory system. The Personal Import Exception allows consumers to go to another State and return with a small amount of alcohol.[5] Thus, a Virginian can visit California's wine country and bring back a few bottles of wine. Similarly, a Virginian who lives on the Tennessee border can buy a six-pack of beer at the convenience store across the state line and bring the beer home. Like Virginia's other alcohol regulations, the Personal Import Exception does not distinguish between alcohol produced in Virginia and alcohol produced elsewhere. If alcohol is produced in Virginia, exported to another State, and purchased by a Virginia resident who

[5] Only one gallon may be imported into Virginia. The Personal Import Exception does not favor Virginia producers of alcohol.

wishes to bring the alcohol back to Virginia, the Personal Import Exception applies.[6]

If a State requires all or virtually all alcohol consumed in the State to pass through the State's regulatory system, then it is necessary to prohibit or severely restrict imports by consumers. If consumers can import unlimited amounts of alcohol, then the State's regulatory system easily may be circumvented and the State will lose effective control over the transportation and distribution of alcohol within its borders. In other words, the sovereignty conferred by the Twenty-first Amendment will be diminished. Although import restrictions designed to ensure the integrity of the State's regulatory system will inhibit interstate commerce, that inhibition is constitutionally authorized.[7] *See* U.S. Const. amend. XXI, § 2. Indeed,

> all "importation" involves shipments from another state or nation. *Every* use of § 2 [of the Twenty-first Amendment] could be called 'discriminatory' in the sense that plaintiffs use that term, because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, then § 2 would be a dead letter.

Bridenbaugh, 227 F.3d at 853 (emphasis original).

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[6] Of course, if the Virginia citizen does not wish to import the wine into Virginia, he may purchase as much wine as is allowed by the laws of that State.

[7] A fundamental difference exists between a policy that has some inhibiting effect on interstate commerce and one that discriminates or causes a cognizable burden on interstate commerce. For example, if a State raises its sales tax or declares a temporary sales tax holiday, the policy inhibits or promotes interstate commerce. Yet, no one would seriously contend that these policies are unconstitutional.

2. Congress Has Authorized the States to Require Virtually All Alcohol Consumed in the State to Pass Through the State's Regulatory System.

Congress, in the exercise of its power to regulate interstate commerce, may enact legislation that explicitly authorizes the States to regulate interstate commerce.[8] *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 434 (1946). *See also* 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW, 1242 (3d ed. 2000) (discussing the Court's decisions regarding congressional authorization of the States' regulation of interstate commerce). *Cf. United States v. Sharpnack*, 355 U.S. 286, 294 (1958) (upholding "a deliberate continuing adoption by Congress [of laws] as shall have been already put in effect by the respective States"). Consequently, even if the Twenty-first Amendment did not explicitly empower the States to require that all or virtually all alcohol in the States pass through the State's regulatory system, Congress could enact legislation that allowed the States to impose such a requirement.

This is exactly what Congress has done. By enacting the Wilson Act, 27 U.S.C. § 121, Congress authorized "the States to regulate imported liquor on the same terms as

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[8] Moreover, any finding of discrimination within the meaning of Commerce Clause jurisprudence "assumes a comparison of substantially similar entities." *General Motors Corp. v. Tracy*, 519 U.S. 278, 279 (1997). Indeed, "in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." *Id.* at 300.

domestic liquor." *Granholm,* 544 U.S. at 478. *See also Scott v. Donald,* 165 U.S. 58, 100-01 (1897) (interpreting the Wilson Act). However, the Wilson Act does not apply until the alcohol actually enters the State. *Granholm,* 544 U.S. at 480-81. *See also Leisy v. Hardin,* 135 U.S. 100, 124-25 (1890) (States were prohibited from regulating the resale of alcohol imported from outside the State so long as the liquor stayed in its original package). Congress responded to this "loophole" by enacting the Webb-Kenyon Act, 27 U.S.C. § 122, "to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Clark Distilling Co. v. Western Maryland R. Co.,* 242 U.S. 311, 324 (1917). The Webb-Kenyon "Act's language displaces any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers." *Granholm,* 544 U.S. at 497-98 (Thomas, J., joined by Rehnquist, C.J., Stevens, & O'Connor, JJ., dissenting). Taken together, the Wilson and Webb-Kenyon Acts authorize the States to regulate alcohol as they see fit as long as the States do not discriminate against alcohol produced out-of-state. In other words, the Wilson and Webb-Kenyon Acts authorize Virginia's alcohol regulation system in general and the Personal Import Exception in particular.

Because both the Twenty-first Amendment and the combination of the Wilson and Webb-Kenyon Acts empower the States to require all or virtually all alcohol to pass through a State's regulatory system, Virginia's regulatory system in general and the Personal Import Exception in particular are constitutional.

B. When the State Acts as a Market Participant, It Can Favor Products Produced Within the State.

When a State purchases goods for its own use or for resale to others, it may favor goods produced within its own State. *See White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 214-15 (1983) (upholding city ordinance which favored hiring city residents for construction jobs); *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (upholding state policy of selling government-produced goods only to residents of the State); *Hughes*, 426 U.S. at 808-10 (upholding statute which made it easier for in-state processors of junk vehicles to do business with the State). For example, when Virginia opens a gift shop in a state park or museum, or operates or stocks vending machines at a highway rest area, it necessarily makes choices to sell some products and not to sell others. In the same vein, when a state university enters into an agreement to market exclusively a particular soft drink on campus, the other soft drinks are excluded from the campus distribution system. It is common for a particular product to be excluded by a particular retailer, even when that retailer is the State. These practices are not regulation of commerce, but simply the realities of retailing. Consequently, when Virginia chooses to sell wine in direct competition with more than 10,000 private sector retailers and with wineries throughout the country licensed by Virginia to ship directly to Virginia consumers, Virginia may choose to stock only Virginia wine.

Nevertheless, the Petitioners insist there is an exception for those situations when the State also acts as regulator of the product that it is selling or purchasing. The Petitioners' novel theory has never been adopted by

this Court.[9] Moreover, if this Court were to create a regulatory exception, it should be limited to those situations where the government is using its regulatory power and market participant power to make itself the exclusive retailer and to restrict consumer choice to in-state products. In other words, if the regulatory exception should be limited to instances where the State is the *only* retail source of a product, it cannot exclude out-of-state products. It should not apply to a situation where there are more than 10,000 private sector competitors of the State and where there are numerous wineries authorized to ship directly to Virginia consumers.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS.

There is no conflict among the Circuits regarding the validity of requiring all or virtually all alcohol to pass through the State's regulatory system. Nor is there a conflict among the Circuits concerning the validity of a State choosing to sell only in-state wine when the State engages in direct competition with more than 10,000 private sector retailers and those wineries throughout the country that are licensed by Virginia to ship directly to Virginia consumers. Indeed, other than the court below, it does not appear that any other federal court has addressed these issues.

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[9] Although there are passages in some opinions which implicitly recognize the possibility of the Petitioners' theory, new constitutional standards cannot be created by "dicta in a prior case in which the point now at issue was not fully debated." *Central Virginia Cmty. Coll. v. Katz*, 126 S. Ct. 990, 996 (2006).

To be sure, in the absence of a conflict, this Court does grant review if there are important questions concerning the States' sovereign choices. *See California Democratic Party v. Jones*, 530 U.S. 567, 571 (2000) (participation in party primary); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 786 (1995) (term limits for members of Congress); *Romer v. Evans,* 517 U.S. 620, 625-26 (1996) (ability of state and local governments to enact non-discrimination provisions). *See also Washington v. Washington State Republican Party*, *cert. granted*, 127 S. Ct. 1373 (2007) (ability of political parties to repudiate candidates claiming to represent the party); *New York State Bd. of Elections v. Torres*, *cert. granted*, 127 S. Ct. 1325 (2007) (requirement that candidates be selected by convention rather than by primary). Those cases involve situations where the lower courts have invalidated a state statute or constitutional provision and the State itself has sought review by this Court. Since the determination of the constitutionality of a legislative act is "the gravest and most delicate duty that [the judiciary] is called upon to perform," *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981), it is appropriate for this Court to review any lower court decision invalidating a state statute on federal constitutional grounds. However, where, as here, the lower court has *upheld* the state statute and the State is opposing certiorari, there is no need for this Court to review the matter absent a clear conflict among the lower courts.

III. THIS PETITION IS A POOR VEHICLE FOR RESOLVING THE QUESTIONS.

This Petition is a poor vehicle for resolving the questions presented. Quite simply, there is no factual

record on the constitutionality of the Personal Import Exception. While there is a record on the constitutionality of the State Stores Provision, it is incomplete.

To explain, after the Fourth Circuit vacated the initial judgment and remanded *Bolick II*, 330 F.3d at 277, the district court permitted the Petitioners to amend their complaint to challenge the Personal Import Exception. However, there was no additional discovery. Instead, the district court granted summary judgment to the Petitioners.

With respect to the State Stores Provision, the district court allowed the parties to develop a factual record in 2001 and 2002 *before Virginia amended its statutes so that out-of-state wineries licensed by Virginia could ship directly to consumers.* Based on this record, the district court declared the State Stores Provision unconstitutional. While the case was on appeal to the Fourth Circuit, the Virginia General Assembly enacted legislation that enabled out-of-state wineries to ship directly to Virginia consumers. Recognizing that this new legislation could alter the analysis, the court of appeals vacated the judgment and remanded for "reconsideration of plaintiffs' challenges in light of the recent statutory enactments and in light of *Beskind*." *Bolick II,* 330 F.3d at 277 (citation omitted).

Yet, on remand, there was no additional discovery or development of the record concerning the impact of the new legislation. Instead, the district court explicitly adopted its previous reasoning and granted the Petitioners' Motion for Summary Judgment. Thus, there is nothing in the record concerning the impact of Virginia's decision to expand further the wine market by licensing out-of-state wineries to ship directly to Virginia consumers.

If this Court is going to determine whether a State may require all or virtually all alcohol consumed in the State to pass through the State's regulatory system, then it should do so in a case where there is a fully developed record on the economic impact of the State's regulatory system. Similarly, if this Court is going to consider some sort of regulatory exception to the States' ability to favor in-state interests when the States act as a market participant, then it should do so in a case where there is a fully developed record on the economic impact of the States' regulation.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted,

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